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Supreme Court, U.S.
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Docket No. 10-311

In the
Supreme Court of the United States

ADVANCED TOWING COMPANY, LLC, ROADRUNNER WRECKER SERVICE, INC., and KING'S TOWING, INC.,

Petitioners,

v.

FAIRFAX COUNTY BOARD OF SUPERVISORS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Virginia properly concluded that a Fairfax County Ordinance, which requires that vehicles towed from Fairfax County be taken to storage lots located within Fairfax County, is rationally related to a legitimate governmental purpose and does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this appeal because the Petitioners have claimed a violation of their rights as protected by the Fourteenth Amendment of the United States Constitution.

INTRODUCTION

In a unanimous ruling, the Supreme Court of Virginia concluded that Fairfax County Ordinance § 82-5-32(e), which requires that trespassing vehicles be towed to a storage lot located within Fairfax County, did not run afoul of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Supreme Court of Virginia affirmed the trial court's decision sustaining the County's demurrer on the pleadings on the same grounds. *Advanced Towing, et al. v. Bd. of Supervisors of Fairfax County,* ____ Va. ____, 694 S.E.2d 621 (2010).

The Petitioners are three towing companies ("the Tow Companies") that do not own, lease, or otherwise operate a storage lot within Fairfax County, Virginia. The sole reason for their petition for a writ of certiorari ("Petition") is the erroneous contention that the Supreme Court of Virginia's ruling is directly contrary to a decision of the Court of Appeals of Maryland in *Verzi v. Baltimore County, Maryland, 333 Md. 411,* 635 A.2d 967 (1994). As set forth more fully below, the *Verzi* decision does not conflict either factually or legally with the Supreme Court of Virginia's decision here. Unlike the ordinance at issue in this cause, *Verzi* involved a residency requirement, and further, it was expressly decided pursuant to the Maryland Constitution rather than the United States Constitution. There is simply no conflict between the Maryland and Virginia courts, and the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

On September 11, 2008, the Tow Companies filed a declaratory judgment action seeking to invalidate Fairfax County Code § 82-5-32(e) ("the Ordinance"), which requires that trespassing vehicles be towed to a vehicle-storage site located within Fairfax County.[1] The Tow Companies alleged that they are all located outside the Fairfax County line (J.A. at 2, ¶ 3)[2] and that the Ordinance's geographical limitation "has no rational relationship to any proper governmental objective." As such, the Tow Companies asserted, in relevant part, that the Ordinance "violates the equal protection rights of the [Tow Companies] as are secured by the Fourteenth Amendment to the Constitution of the United States." (J.A. at 3, ¶ 9.) On December 19, 2008, the Fairfax County Circuit Court ("Circuit Court"), the Honorable Bruce D. White presiding, granted the Fairfax County Board of Supervisor's ("County's") Demurrer because the Tow Companies had failed to identify any class of persons that was being treated unfairly, but gave the Tow Companies leave to amend. (J.A. at 23.)

On December 23, 2008, the Tow Companies filed an Amended Complaint, virtually identical to

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[1] Fairfax County Code § 82-5-32(e) provides in relevant part that "[e]very site to which trespassing vehicles are towed shall comply with the following requirements: (1) A tow truck operator must tow each vehicle to a storage site located within the boundaries of Fairfax County."

[2] Citations to the record are to the Joint Appendix filed in the Supreme Court of Virginia and are cited "J.A. at [page number]."

the original Complaint, except that they expressly specified that Fairfax County Code § 82-5-32(e) "establishes an unconstitutional classification which impermissibly draws an unfair distinction between [tow companies] who have a storage facility in Fairfax County and [tow companies] who do not have a storage facility in Fairfax County." (J.A. at 26–27, ¶ 11.) On February 13, 2009, the Circuit Court sustained the County's Demurrer to the Amended Complaint and entered a Final Order because the Circuit Court concluded that County Code § 82-5-32(e) was rationally related to the administration and enforcement of the Ordinance. (J.A. at 56, 59.) The Circuit Court then issued a suspending order in response to the Tow Companies' Motion to Reconsider on grounds not before this Court.

On March 13, 2009, after accepting briefs and hearing additional argument on the Motion to Reconsider, the Circuit Court denied the Motion, properly concluding that the Ordinance was Constitutionally sound. (J.A. at 90). The Tow Companies then timely noted their appeal to the Supreme Court of Virginia, which ruled on June 10, 2010, that the Ordinance did not violate the United States Constitution. This appeal followed.

REASONS FOR DENYING THE PETITION

I. The Maryland Court of Appeals' *Verzi* Decision Does Not Conflict with the Decision of the Supreme Court of Virginia.

There is no merit to the Tow Companies' assertion that "[t]he decision of the Supreme Court of

Virginia is in direct conflict" with the Court of Appeals of Maryland in *Verzi v. Baltimore County,* 635 A.2d 967, (Md. 1994), or that the two cases are "factually indistinguishable." (Pet. at 6-7)[3]. First, despite the Tow Companies' unsupported assertion to the contrary, the Ordinance at issue in this matter is not a residency requirement. Unlike the ordinance at issue in *Verzi,* nothing in the Ordinance requires, mandates, or otherwise compels the Tow Companies to be citizens or residents of Fairfax County. The Tow Companies may have principal offices located in other counties, other states, or even other countries. They must, however, tow any trespassing vehicles to a storage facility located within Fairfax County. Nothing in the Ordinance, however, precludes these companies from owning such a lot, leasing one or making whatever arrangements necessary to tow vehicles to such a lot. This "location" requirement for storage lots, however, is not "essentially" a residency requirement for their operators. Pet. at 7. And it does not become a "residency requirement" merely because the Tow Companies have labeled it as such.

The Tow Companies also wholly ignore the fact that the Maryland Court of Appeals expressly concluded in *Verzi* that its decision was not based on any federal constitutional claims. *Verzi*, 635 A.2d at 975, n.4. Rather, it determined only that "[b]y requiring all of its towers [sic] to be located within the county boundaries, Baltimore County . . . violates the Equal Protection guarantees of Article 24 of the *Maryland Declaration of Rights*." (Emphasis added.)

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[3] Citations to the Petition for Writ of Certiorari are cited as "Pet. at [page number]."

As such, it is incomprehensible how the Petitioners can state that the two cases are "indistinguishable." Pet. at 7.

II. The Supreme Court of Virginia Properly Concluded that the Ordinance Does Not Violate the Equal Protection Clause of the United States Constitution Because it is Rationally Related to Legitimate Governmental Purposes.

The Tow Companies' argument that their Petition must be granted because there is a "direct conflict" between the Maryland and Virginia courts' attempts to hide the greater weakness of their case: namely, that the Supreme Court of Virginia properly concluded that the Ordinance furthers a legitimate governmental purpose, and as such, it must survive an Equal Protection challenge.

The Amended Complaint specifies only that the Fairfax County Code "establishes an unconstitutional classification which impermissibly draws an unfair distinction between [towing companies] who have a storage facility in Fairfax County and [towing companies] who do not have a storage facility in Fairfax County." (J.A. at 26-27.) The Tow Companies do not allege that the Ordinance involves any suspect classification or fundamental right, and thus, the Ordinance is subject to the most deferential review under the "rational basis" test. *See Exxon Corp. v. Eagerton,* 462 U.S. 176, 196 (1983). This test compels judicial restraint.

> [E]qual protection is not a license for courts to judge the wisdom, fairness,

> or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification.
>
> . . . . [A] legislative choice is *not subject to courtroom fact finding* and may be based on *rational speculation unsupported by evidence or empirical data*.

Fed. Commc'n Comm'n v. Beach Commc'n, Inc., 508 U.S. 307, 313-315 (1993) (emphasis added).

Here, the sole basis for the Tow Companies' equal protection challenge is that towing companies without a storage lot in Fairfax County suffer "adverse economic consequences" not shared by towing companies that do have a storage facility in Fairfax County. (J.A. at 27.) This allegation, even if true, does not come close to overcoming the rational basis test outlined in *Beach Communications*, and the Supreme Court of Virginia properly affirmed the trial court's demurrer.

A. The Tow Companies' Amended Complaint Failed To Name An Improper Classification or Articulate Harms That Rebut The Ordinance's Strong Presumption Of Constitutionality.

The Amended Complaint rests solely on the contention that the Ordinance makes an unfair distinction between towing companies that have a storage lot in Fairfax County and those that do not. (J.A. at 26-27.) A review of the Ordinance, however, reveals that it makes no such distinction; it merely provides that "[a] tow truck operator must tow each vehicle to a storage site located within the boundaries of Fairfax County." Fairfax County Code § 82-5-32(e). The Ordinance does not preclude the Tow Companies from obtaining or using a tow lot in Fairfax County. Nor does the Ordinance discriminate against the Tow Companies. They are just as able as other tow truck operators to use a tow lot in Fairfax County. *See Cavalier Vending Corp. v. State Bd. of Pharmacy,* 195 Va. 626, 634, 79 S.E.2d 636, 640 (1954) (holding that statute requiring contraceptive devices to be sold in pharmacies did not discriminate against vending machine operators because operators were still free to sell such devices within the regulatory framework).

Even assuming, *arguendo,* that the Ordinance makes a distinction among tow truck operators, this distinction, by itself, is not unconstitutional. To some extent, all laws make distinctions among persons or activities. *See Cavalier Vending Corp.*, 195 Va. at 634, 79 S.E.2d at 640 (holding that equal protection is not implicated by either legislation that

is limited "in the objects to which it is directed, or by the territory within which it is to operate.")

Here, the Tow Companies contend that the Ordinance imposes upon them "adverse economic consequences" not suffered by those who do have storage lots within Fairfax County. (J.A. at 27; Am. Compl. ¶12.) This type of economic impact, even if true, does not equate to an unconstitutional burden. Indeed, even in the context of heightened scrutiny, economic burdens placed on the free exercise of religion are constitutionally permissible. *See, e.g., Lakewood Congregation of Jehovah's Witnesses v. City of Lakewood,* 699 F.2d 303, 307 (6th Cir. 1983). In short, the Tow Companies' allegations fail to overcome the strong presumption of constitutionality afforded the Ordinance.

B. The Ordinance Survives A Constitutional Challenge Even At Demurrer Because It Is Conceivable That The Ordinance Is Rationally Related To Legitimate Governmental Interests.

Under the rational basis test, it is well-settled that at the demurrer stage of proceedings a court may engage in "rational speculation" to support the constitutionality of legislation. *Finn v. Va. Ret. Sys.* 259 Va. 144, 155, 524 S.E.2d 125, 131 (2000). Indeed, the court's support of a legislative choice is not subject to "courtroom factfinding," and need not be based upon "evidence or empirical data." *Id.* at 155, 524 S.E.2d at 131.

Not only is a court permitted to completely speculate and theorize how legislation may be supported, but the Petitioners had the burden to negate "every conceivable basis which might support it." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973). In this regard, the Tow Companies' challenge to the Ordinance cannot succeed.

In this case, it is certainly *conceivable* that the Ordinance's geographical limitation is rationally related to the County's ability to administer and enforce its various towing regulations. *See* Fairfax County Code § 82-5-32(e) (setting forth a variety of regulations regarding vehicle storage facilities, such as illumination requirements and posted signage, among others). Although Va. Code Ann. § 46.2-1232 (2010) provides that the County's regulations would be applied in the locality to which the vehicle is towed, the statute does not give Fairfax County officials the authority to enforce any of its towing regulations outside the jurisdictional limits of Fairfax County.

The Petitioners' assertion that this argument is "without merit," ignores existing law. Pet. at 9. The County simply has no authority to enforce its regulations governing vehicle-storage facilities in other localities. *See, e.g.*, Va. Code Ann. § 15.2-1724 (Supp. 2010) (setting forth the limited circumstances when a locality's police officers may go beyond the territorial limits of that locality; enforcement of a towing ordinance is not among the enumerated circumstances). Rather, the enforcement of the County's ordinances in this arena will be essentially left up to the discretion of enforcement officials in the

localities to which the vehicle is towed. *See* Va. Code Ann. § 46.2-1232(A) (2010) (providing that if a vehicle is towed to another locality, the ordinance of the locality from which the vehicle was towed shall apply).

Nor does the legislative scheme set out in Va. Code Ann. §§ 46.2-2800 through 2828 salvage the Petitioners' argument. Their assertion that the newly established Board of Towing and Recovery Operators ("BTRO") "provides a comprehensive scheme for the enforcement of all local towing ordinances" is simply wrong.[4] Pet. at 8. The BRTO has no such authority. *See* Va. Code Ann. § 46.2-2805 (2010) (setting forth the powers of the BTRO, which relate primarily to the licensure of towing operators). In fact, Va. Code Ann. § 46.2-2828 (2010) expressly provides that the BTRO has limited authority over local ordinances. *See* Va. Code. Ann. § 46.2-2828 (providing that "[i]n the event of a conflict between an action of the Board and any ordinance adopted by [a locality], . . . the *provisions of such local ordinance shall be controlling.*") (emphasis added).

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[4] It should also be noted that *Verzi* is further distinguishable from this case because although Maryland may have a "statewide law with comprehensive powers" such that it is able to "supervise and administer the towing companies," that regime has not been replicated in Virginia. In the *Verzi* decision, the Court of Appeals of Maryland expressly held that Baltimore County officials had regulatory and criminal enforcement power that extended beyond county boundaries. 635 A.2d at 974. Fairfax County officials simply do not have such enforcement power.

Given that the Ordinance directly furthers Fairfax County's ability to administer and enforce its towing regulations, the Supreme Court of Virginia properly concluded that the Ordinance survives an equal protection challenge. *See also, Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617, 623-24 (1961).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that the Court deny the petition.

Respectfully submitted,

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